

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 562 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
  2. To be referred to the Reporter or not? : YES
  3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
  5. Whether it is to be circulated to the Civil Judge? : NO

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JASHBHAI SOMABHAI @ DADABHAI PATEL

Versus

KAMLABEN WD/O MATHURBHAI DADABHAI  
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Appearance:

MR BHARAT J SHELAT for Petitioner

MR AB MUNSHI FOR MR AJ PATEL for Respondent No. 1, 2, 3  
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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 30/03/2000

ORAL JUDGEMENT

#. This is plaintiff's appeal against judgment and decree dated 18-12-1979 of Civil Judge (SD), Nadiad dismissing the appellant's suit for declaration, specific performance, refund of earnest money and for the payment of damages together with interest.

#. The brief facts are that initially the plaintiff appellant filed a suit for declaration that the sale deed dated 17-12-1996 executed by defendant No.1 in favour of the defendants No.2 & 3 is without consideration, illegal, null and void. Admittedly, the plaintiff appellant was not party to the sale deed. During the pendency of the suit, application for amendment of the plaint was moved which was allowed and additional reliefs of specific performance and in the alternative refund of earnest money were also added. The case of the plaintiff appellant was that the defendant No.1 executed an agreement to sell in his favour on 13-8-1976 for a consideration of Rs.15,000/- and agreed to sell her house for this amount and received earnest money amounting to Rs.5,000/-. It was alleged that subsequently on 17-12-1976 the defendant No.1 executed sell deed for the same house in favour of defendants No.2 & 3 for Rs.20,000/- and this sale deed is illegal without consideration and null and void. According to the plaintiff, it was executed to defeat the claim of the plaintiff accrued on the basis of agreement to sell executed in his favour by the defendant No.1 on 13-8-96. The plaintiff therefore prayed that the sale deed be declared illegal and void being without consideration. He further prayed for decree for specific performance of agreement to sell dated 13-8-76 be granted and in the alternative, refund of earnest money of Rs.5,000/- be ordered in favour of the plaintiff and the defendant No.1 be further ordered to pay damages of Rs.5000/- together with interest.

#. The defendant No.1 in her written statement denied all these allegations and pleaded that the sale deed was executed after receiving full consideration of Rs.20,000/- and that it is incorrect that the sale deed is without consideration or null and void. She also pleaded that she did not execute any agreement to sell in favour of the plaintiff nor she received any earnest money amounting to Rs.5,000/- from the plaintiff. She therefore pleaded that the suit is liable to be dismissed.

#. The trial court framed number of issues and having taken all issues into consideration, answered all the issues in negative. Consequently, the suit was dismissed by the trial court. It is therefore this appeal.

#. I have heard Shri B.J. Shelat, learned counsel for the appellant and Mr.A.B.Munshi, learned counsel for and on behalf of Mr.A.J. Patel for the respondents.

#. After going through the judgment and material on record, I found that the trial court has rightly held that the plaintiff failed to establish execution of agreement to sell Exh.45 and further failed to establish that he paid earnest money amounting to Rs.5,000/- to the defendant No.1. The trial Court has also taken into consideration various contradictions in evidence produced on record and has also noticed that the stamp papers were suspicious. It has been observed by the trial court that the agreement to sell was executed on 13-8-76. According to the plaintiff, the stamp papers were purchased on the same date viz. on 13-8-1976. The trial court however found that one stamp paper of Rs.2/- denomination was purchased on 12-12-1976, whereas, another stamp paper of Rs.1.25 ps was purchased on 12-8-76. The trial court in these circumstances has rightly drawn adverse inference for non examination of the stamp vendor to clarify whether the endorsement regarding the date of purchase of his stamp papers was mistaken and the mistake was on the part of the stamp vendor. If the stamp vendor was not examined, the trial court was justified in drawing inference that these two stamp papers were suspicious. If the stamp papers were suspicious then, the plaintiff's case was liable to be viewed with suspicion. Of course, the evidence on record was to be cautiously examined and not on mere suspicion, the plaintiff's case could be thrown away.

#. The trial court again rightly observed that the material witness Shankerbhai was not examined. The plaintiff on the other hand examined two witnesses. The trial court found that these two witnesses were unreliable and interested. The trial court also found that the witnesses examined by the plaintiff were tutored. The trial court also noticed that Gangaben the daughter of the defendant No.1 filed a suit challenging the sale deed on the ground that her 1/3 share in the disputed house could not be sold by the defendant No.1 to the defendants No.2 & 3. The trial court had also taken into consideration the fact that in that suit, Gangaben did not utter a word that any agreement to sell was executed by the defendant No.1 viz. by her mother. On the other hand, Gangaben filed affidavit Exh.7 in the suit out of which the present appeal arose and that affidavit was in favour of the plaintiff which was filed on 20-12-1976. The Civil Suit filed by her was numbered as 33 of 1977. Thus, this suit was subsequent and in all fairness, she should have disclosed that an agreement to sell was executed by her mother in favour of the plaintiff. The trial court has also taken into

consideration the entire evidence on record and rightly concluded that the plaintiff failed to establish payment of Rs.5,000/- as earnest money to the defendant No.1. I do not see any reason to disagree with the finding of the trial court on these two points. Thus, if the execution of the agreement to sell is not proved by the plaintiff and it is further not proved that he had paid Rs.5,000/as earnest money, he had no case either for a decree for specific performance of agreement to sell or for refund of earnest money amounting to Rs.5,000/-.

#. Even if for a moment, we proceed on the assumption that such agreement to sell was executed, a decree for specific performance could not be granted by the trial court because of non observance of requisite ingredients contained in Section 16(c) of the Specific Relief Act. This section obliges a plaintiff seeking decree for a specific performance of agreement to sell to allege in the plaint and also to prove by evidence that he was always ready and willing to perform his part of the obligation under the agreement and was also ready and willing to perform his part of obligation under the agreement on the date of the suit and also subsequently. This essential condition of Section 16(c) of the Specific Relief Act was neither alleged in the subsequently amended plaint nor these requirements were proved by any evidence from the side of the plaintiff. Thus, if the ingredients of Section 16(c) of the Special Relief Act were not made out, the suit for specific performance could not be decreed despite the fact that the execution of the agreement to sell allegedly stood proved.

#. Shri Shelat has contended that even if execution of agreement to sell is not proved, the defendant No.1 should have proved the execution of the sale deed Exh.50 in favour of the defendants No.2 & 3 and since this was not done, at least part of the relief could be granted giving declaration that the sale deed is illegal, null and void being without consideration. I find no merit in this contention. The relief clause reproduced in the judgment of the trial court indicates that it be declared that the sale deed executed by the defendant No.1 in favour of the defendants No. 2 & 3 is without consideration, illegal, null and void. This relief implies that the execution of the sale deed by the defendant No.1 was not disputed by the plaintiff. Otherwise, he should have pleaded that the execution of the sale deed was not proved. It is for the person who relies upon the sale deed to establish its execution. The defendant No.1 was not the plaintiff or suitor in the

suit. Consequently, there was no obligation on the part of the defendant No.1 to establish due execution of the sale deed. The sale deed was not unregistered document. It is a registered document. If attesting witnesses or marginal witnesses were not examined by defendant No.1, it cannot be said that the registered document was not duly executed or proved. It may be mentioned that the plaintiff is third party and not a party to the sale deed. Even a third party can challenge the validity of the sale deed, but he could not be said to have been precluded by claiming consequential relief of cancellation of the sale deed. That has also not been prayed for.

##. There is evidence of the defendant No.1 - a lady aged about 73 years, that she executed a sale deed in favour of the defendants No.2 & 3 consciously after receiving full consideration. It was registered document and the endorsement of the Sub Registrar regarding the receipt of consideration can be relied upon by the court. It has evidentiary value and it can be overlooked only if some evidence in rebuttal came forward on the record. There was nothing on record to show that the endorsement of the Sub Registrar was either collusive or incorrect. Consequently, in addition to the statement of the defendant No.1 there is corroborative evidence in the nature of endorsement of the Sub Registrar for proving that the sale deed was executed for consideration.

##. The trial court rightly repelled the plea of the plaintiff that the sale deed was collusive with a view to defeat the plaintiff's claim for sale in his favour. The trial court on the other hand rightly concluded that the agreement to sell was subsequently got prepared by the plaintiff with a view to defeat valid sale deed executed earlier by the defendant No.1 in favour of the defendants No.2 & 3

##. Another contention has been that the sale deed seems to be suspicious because the defendant No.1 is still occupying the house allegedly sold by her to the defendants No.2 & 3. This suspicion has also no weight because it is in the statement of the defendant No.1 that she is issueless lady and she requested the defendants No. 2 & 3 to permit her to occupy the house after execution of the sale deed because she had no shelter and that she was permitted by the defendants No.2 & 3 to live in the house during her life time. In view of this permission from the defendants No. 2 & 3 to the defendant No.1, it cannot be said by any stretch of imagination that delivery of possession was not effected.

Recital regarding delivery of possession is to be found in the sale deed itself and if after execution of the sale deed vendee permitted the vendor to occupy the house during her life time, it cannot be said that delivery of possession was suspicious or that it renders the sale deed suspicious.

##. To sum up therefore, it can be said that the plaintiff miserably failed to establish the execution of the agreement to sell by the defendant No.1 in his favour. He also failed to establish the ingredients of Section 16(c) of the Specific Relief Act. He also failed to establish payment of earnest money to the defendant No.1. As such, decree for specific performance could not be granted by the trial court. The plaintiff further failed to establish that the sale deed executed by the defendant No.1 in favour of the defendants No. 2 & 3 is illegal, null, void and without consideration. Consequently, the declaration sought for by the plaintiff could not be granted. Mere declaration without praying for consequential relief also could not be granted. As such, the trial court was justified in dismissing the suit. I don't find any merit in the appeal which is hereby dismissed with no order as to costs.

Date : 30-3-2000 [ D.C.Srivastava, J. ]

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